IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No 642 of 1998

For Approval and Signature: sd/-

Hon'ble MR.JUSTICE B.J.SHETHNA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

VINOD METALS PVT.LTD.

Versus

SHYAM CORPORATION

Appearance:

1. Appeal from Order No. 642 of 1998

MR HARIN P RAVAL for Petitioner No. 1

MR DHARMESH V SHAH for Respondent No. 1

MR MG NAGARKAR for Respondent No. 1 (Absent)

MR AB BHATT for Respondent No. 1

CORAM : MR.JUSTICE B.J.SHETHNA

Date of decision: 25/10/2001

ORAL JUDGEMENT

1. The appellant - original plaintiff has challenged, in this Appeal, the impugned order dated 15.12.1998 passed by the learned Chamber Judge, City Civil Court No.20, Ahmedabad, dismissing the Notice of Motion Ex.6 and 21 in Civil Suit No.4701 of 1998.

2. Learned Counsel Shri Raval for the Appellant vehemently submitted that the learned Judge has completely erred in dismissing the Application Ex.6 and

21 by the impugned order on the ground that the appellant - plaintiff has failed to prove the ownership of the disputed wall. He submitted that the very fact that the Ahmedabad Municipal Corporation issued the notice u/s.260(1) of the B.P.M.C Act for removal of construction made by the appellant on the margin land wherein the disputed wall is situated itself is sufficient to come to the conclusion that the disputed wall is of the ownership of the appellant - plaintiff. But, the learned Advocate Shri Raval was not in a position to state as to whether the appellant - plaintiff submitted any reply to it or not. Shri Raval, in support of his submission, has tried to rely upon the interim order dated 30.9.1999 passed by my learned Brother Mr.Justice A.R.Dave in Civil Application No.12419 of 1998 filed in this Appeal. However, learned Counsel Shri Shah for the respondent defendant submitted that the defendant has specifically come out in its written statement that the wall on the southern side was constructed by them and on their wall they wanted to put up further construction. He also submitted that as per the Sale Agreement (mark 28/1) the defendant had purchased the portion of land No.65 with construction. Shri Shah has also relied upon the Certificate dated 26.9.1998 (Mark 32/2) issued by Civil Engineer Shri Ashok Desai showing that the plaintiff had constructed factory building before 1981-82 with a boundry wall on eastern, western and northern side, whereas the boundry wall on southern side was constructed in 1983-84. Shri Shah further submitted that whatever construction put up by the defendant was within the area of plot No.65 which was purchased by the defendant under a valid Sale Agreement after obtaining the due "RAJACHITHI" (valid permission) from the Ahmedabad Municipal Corporation, therefore, the plaintiff had no right whatsoever to restrain the defendant from constructing the sheds in its own land. He also submitted that when the trial Court having considered all the material and documentary evidence led before it came to the conclusion that the plaintiff failed to prove the prima facie case in its favour and exercised discretion against the plaintiff then this Court should not interfere in Appeal.

3. Having carefully gone through the impugned order passed by the learned trial Judge and the reasons assigned in it for dismissing the Application Ex.6 and 21, I am fully convinced that the learned Judge has not committed any error while dismissing the Application Ex.6 which calls for interference of this Court in Appeal. Admittedly, the defendant is the owner of plot No.65 which was purchased by it under a valid Sale Agreement

with due valid permission i.e. "Rajachithi" from the Ahmedabad Municipal Corporation. The defendant has specifically come out with the case that the wall was constructed by it on which it wanted to put up further construction. On appreciation of documentary evidence and other material placed before it if the learned trial Judge has come to the conclusion that the plaintiff has failed to prove the prima facie case in his favour and therefore vacated the ad.ainterim injunction then this Court would certainly not interfere in such order in Appeal.

4. Shri Shah, learned Counsel for the respondent original defendant also submitted that during the pendency of this Appeal new Act has come into operation under which unauthorised construction can be regularised by the Ahmedabad Municipal Corporation by charging impact fees and under the provisions of the said Act the defendant has applied before the Corporation for regularising the construction and the decision has been taken by the Competent Authority of the Corporation recently i.e. on 9.10.2001 whereby the defendant is required to pay the impact fees of Rs.7,98,492/- out of which the defendant is required to pay 25 % of the said amount i.e. Rs.2 lacs for which Deputy Municipal Commissioner (East Zone) of Ahmedabad Municipal Corporation has already given its sanction. He, therefore, submits that not only the plaintiff has failed to prove prima facie case in its favour, but the balance of convenience was also not in its favour. The learned Judge has not given his finding on the point of balance of convenience. He submitted that even if it is held that the plaintiff proved the prima facie case in its favour then also the balance of convenience was never in his favour, therefore by continuing the stay the defendant would suffer irreparable loss which is not likely to be compensated in terms of time or money whereas the plaintiff would not suffer any irreparable loss if the injunction is not granted in its favour.

5. On peculiar facts of the case I am fully convinced that the plaintiff has no prima facie case and even the balance of convenience was not in its favour and by vacating the interim relief no irreparable loss is going to cause to the plaintiff. On the other hand, if the injunction is not vacated then the defendant is going to suffer irreparable loss. Thus, the balance of convenience is in favour of the respondent - defendant, therefore also the impugned order passed by the learned trial Judge is required to be confirmed and the ad.interim relief granted earlier on Civil Application is

required to be rejected.

6. At this stage it was submitted by Shri Raval for the appellant that Civil Application No.12419 of 1998 filed in this Appeal from Order was allowed by the learned Single Judge of this Court. Therefore this Court can not take different view in the matter in this Appeal. This submission of Shri Raval can not be accepted for the simple reason that it was an interim order passed by the learned Single Judge of this Court on Civil Application during the pendency and final disposal of this Appeal. It can never be binding to this Court while deciding this Appeal finally on merits. At the most the said order can be duly considered while finally deciding the main Appeal from Order. I have carefully perused the interim order dated 30.9.1999 passed on Civil Application No.12419 of 1998 by the learned Single Judge of this Court. From the said order it is clear that the learned Counsel Shri Nagarkar appearing for the Ahmedabad Municipal Corporation (who was not present at the time of hearing of this Appeal) had drawn the attention of the learned Single Judge of this Court that both, the plaintiff as well as the defendant, had put up some construction in violation of building bye-laws and the defendant put up construction on their own land which was not accordance with the plan sanctioned by the Corporation.

On the above submission made by shri Nagarkar before the learned Single Judge of this Court, the learned Single Judge allowed the civil Application No.12419 of 1998 and directed that during pendency of the Suit the respondent - defendant shall not use the wall in question and shall not put up construction in a manner so that the wall in question is used for support of the construction by observing that "looking to the facts of the case and upon perusal of the impugned order, it appears that the respondent - defendant has no right to use the wall in question and it cannot be permitted to use or take support of the wall because by permitting the respondent - defendant to use that wall in question, the respondent - defendant would be permitted to continue to put up further construction in violation of building bye-laws."(emphasis supplied).

7. With utmost respect to the learned Single Judge, while deciding Civil Application he could have restrained the respondent - defendant from using the wall in question or from putting up construction of the wall till the pendency of the Appeal and not the Suit. Because, that direction has to be given while deciding the main Appeal from Order which was kept very much alive by the

learned Single Judge himself. Secondly, what are the facts of the case have not at all been stated by the learned Judge in his order dated 30.9.1999 while granting injunction and allowing the Civil Application. I have set out the facts of the case in a nutshell earlier and on examining the reasons assigned by the learned trial Judge carefully I am of the considered opinion that the learned trial Judge has not committed any error in rejecting the Applications Ex.6 and 21 on the facts of this case.

8. One more important development in this case is that during the pendency and final disposal of this Appeal the Government of Gujarat has introduced new Act i. e. The Gujarat Regularisation of Unauthorised Development Act, 2001, under which unauthorised construction can be regularised by charging impact fees and the defendant had already applied before the Corporation for which the permission has already been granted recently on 9.10.2001 by the Corporation by charging substantial amount by way of impact fees from the defendant. Photostat copy of the permission is produced by Shri Shah for the respondent.

Under the circumstances the argument advanced by Shri Raval that on Civil Application learned Single Judge passed an order in his favour, therefore, this Court can not take different view of the matter has to be rejected and it is rejected.

9. In view of above discussion this Appeal fails and is hereby dismissed. There shall be no order as to costs. Once the Appeal is dismissed then the interim order granted in favour of the appellant - defendant by the learned Single Judge of this Court on 30.9.1999 in Civil Application No.12419 of 1998 has to be vacated and it is hereby vacated.

10. At this stage the request is made by Shri Raval for the appellant - plaintiff for continuing the interim relief granted by this Court for a period of 4 weeks to enable him to obtain appropriate order from the Hon'ble Supreme Court in Special Leave Petition. This was vehemently objected by Shri Shah for the respondent on the ground that the defendant has already suffered a lot since 1998 and now that the Corporation has also regularised its construction by charging impact fees running into lacs of rupees then this Court should not continue the interim relief even for a day when this Court has found on merits that the appellant - original plaintiff has no case in Appeal. Initially ex-parte

ad.interim relief was granted by the trial Court in favour of the appellant - plaintiff in 1998 and the same has continued even after its vacation by the trial Court till today because of the interim order passed by this Court on Civil Application filed in this Appeal, therefore, the request made by learned Counsel Shri Raval for the Appellant to continue the interim relief, granted by this Court, for a period of 4 weeks from today is granted.

sd/-

Date : October 25, 2001 (B.J.Shethna, J.)

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